

MBSLE

22 January 1949

C  
O  
P  
Y

MEMORANDUM FOR: THE CHAIRMAN OF THE MUNITIONS BOARD

SUBJECT: Legal Considerations Involved in the Service to the Government  
by Members of Private Industry

1. Supplementing my memorandum of 12 November 1948, you have asked my opinion on the following situations:

(1) The employee receives compensation for services from private industry and receives compensation for services to the Government;

(2) The employee is on leave of absence with pay and receives full pay from the Government;

(3) The employee is on leave of absence with pay from private industry and gives his time free to the Government;

(4) The employee receives a portion of his pay from private industry and receives full pay from the Government;

(5) The employee's pay by the Government for his services is supplemented by payment of money from private industry;

(6) The employee receives full pay from private industry and acts as a consultant to the Government on a per diem basis.

2. As to the first situation, the right of a Government official to receive pay from industry for service performed for industry and to receive pay from the Government for service performed for the Government, it is my opinion that private employment and receipt of income therefor is not a bar to appointment as an official of the Government, provided that the nature of the official duties and their relation to the private business activities of the appointee do not give rise to a conflict of interests or otherwise render the dual connection objectionable as a matter of policy. While 5 U.S.C. 66 prohibits any Government official from receiving, or any person, firm, or corporation from paying, any salary or supplement thereto for the services performed by such official for the Government, the Attorney General in an opinion dated April 27, 1942 (40 Op. Atty. Gen. 47) has held:

184

C  
O  
P  
Y

"So far as the law is concerned, there is no prohibition against the conduct of private business activities for compensation by an officer of the United States, except with reference (1) to certain public offices enumerated by statute, (2) to certain private business activities enumerated by statute, and (3) apart from statute, to all other cases of a clear conflict of interest between the particular public office and the particular private business activity."

\* \* \* \* \*

[Here follows enumeration of specific prohibitions, Secretary of Treasury, etc., and an enumeration of the conflict of interest statutes cited in paragraph 1 of my 12 November memorandum.]

\* \* \* \* \*

"The statute [5 U.S.C. 66] clearly covers a salary received from a private person or source if it is paid or received as compensation or part compensation for the services rendered to the Government. It has also been held to apply if the officer or employee renders the same or similar services to both the Government and a private person (33 Op. A.G. 273). It does not, however, prohibit payment for services rendered exclusively to private persons or organizations and which have no connection with the services rendered to the Government. This distinction has been pointed out by my predecessors (38 Op. 294; 39 id. 501).

"Other cases of conflicts of interest.—Apart from statute, there are certain principles of fair dealing which have the force of law and which are applicable to officers of the Government. A public office is a public trust. No public officer can lawfully engage in business activities which are incompatible with the duties of his office. He cannot in his private or official character enter into engagements in which he has, or can have, a conflicting personal interest. He cannot allow his public duties to be neglected by reason of attention to his private affairs. See United States v. Carter, 217 U.S. 286, 306. Such conflicts of interest are not tolerated in the case of any private fiduciary, and they are doubly proscribed for a public trustee.

"Summary: Except with reference to the specified public offices mentioned under (1) above, the law does not prohibit a public officer from carrying on a private business activity for compensation, at least when the private activity is unrelated to any business of the Government. When the private activity does touch upon some interest of the Government, it may be continued only when it falls outside the bar of the statutes and principles of law which are listed in (2) and (3) above, and which are aimed primarily at improper conflicts of interest."

The Comptroller General has also held (22 Comp. Gen. 179; September 3, 1942) that there is no general law which prohibits the payment of compensation by private industry to an official employed by the Government.

3. On the second situation, where the employee is on leave of absence with pay and receives full pay from the Government, it is my opinion that there is no legal bar to this procedure, again provided that the nature of

Chairman of the Munitions Board

- 3 -

22 January 1949

the official duties and their relationship to the private business connection do not give rise to a conflict of interest. The Attorney General has stated in a similar case (39 Op. A.G., page 501):

"The payments in such circumstances are made with respect to the former employment and incidental to the leave granted; they are not made 'in connection with' the services of the individual as an official or employee of the United States within the contemplation of the statute. [The statute referred to is 5 U.S.C. 66, which prohibits the Government official from receiving salary for services performed by such official for the Government.]"

4. In the third situation, the employee is on leave of absence with pay from private industry and gives his time free to the Government. The statute cited in my 12 November 1948 memorandum, 31 U.S.C. 665, prohibits, among other things, the acceptance of voluntary service for the Government. Therefore, one could not be an officer of the Government, using officer in the sense of one charged with discretion and given certain authorities and duties to perform, without being put on the payroll. This situation, of course, should be distinguished from several situations which have existed in the Office of the Secretary of Defense, where consultants have given free time and advice to the Secretary of Defense, without being sworn in as officers. These men were rendering informal advice, and it seems clear that the head of an agency may seek advice from outside sources in the performance of his duties. There has been some question as to the right of an individual to waive a salary even though being sworn in as an officer. This conclusion seems to be that this is against public policy, since it would tend to have administrators enlarge their staffs beyond appropriation limits and further would avoid the intention of Congress that a man good enough to earn a specific salary should be paid that salary in order to insure that competent employees are obtained. Compare Comptroller General Decision B-66665 of 27 June 1947.

In my opinion, therefore, if the individual is going to perform duties, he should be sworn in as a regular employee and paid the salary that attaches to the job.

5. The fourth situation listed above is one in which the employee receives a portion of his pay from private industry and receives full pay from the Government. In this situation, if the employee is receiving leave with a reduced amount of pay, there is no legal objection to it; however, the pay must relate to the leave and not to the services performed for the Government.

6. The fifth situation listed above is the one in which the employee's pay by the Government for his services is supplemented by a payment of money from private industry. By hypothesis, industry is paying him for the work he is doing for the Government, presumably on the basis they want a particular man in a particular position, whatever might be the motivation; i.e., to get the job done better or obtain some advantage. This is absolutely proscribed by 5 U.S. Code, 66.

Chairman of the Munitions Board

- 4 -

22 January 1949

7. The sixth situation, where the employee receives full pay from private industry and acts as a consultant to the Government on a per diem basis, is lawful. Public Law 253 of the 80th Congress (the National Security Act of 1947) in section 303 authorizes the Secretary of Defense to employ advisory committees and part-time advisory personnel and provides an exemption from the first three statutes listed in my memorandum of 12 November, with the condition "unless the act of such individual which by such section is made unlawful--is with respect to any particular matter which directly involves a department or agency which such personnel is advising or in which such department or agency is directly interested." These statutes in brief are as follows:

a. 18 U.S.C. Section 283, which makes it an offense for an officer or employee to act as agent or attorney or to aid or assist in the prosecution of a claim against the Government.

b. 18 U.S.C. 281, which makes it an offense for an officer or clerk to receive compensation for services rendered by himself or another in relation to any proceeding, contract, or claim in which the United States is a party or is interested.

c. 18 U.S.C. 284, which makes it an offense for any person having been employed in any Government agency, within two years after such employment has ceased, to prosecute or to act as counsel or agent for any claim against the United States involving a subject matter directly connected with such employment.

8. In passing, note should be made of subsection (j) of the Renegotiation Act, which permits prosecution of claims against the United States by persons serving in a department or the Renegotiation Board, except as to matters directly connected with which the person was employed or during the period the person is employed. Further note should also be made of section 19(d) of the Contract Settlement Act (41 U.S.C. 119) which makes it an offense for any person employed in a Government agency, during his employment to prosecute or act as agent or attorney for prosecuting a claim against the United States, or for such person within two years after the employment or service has ceased, to prosecute or to act as attorney or agent for prosecuting a claim involving any subject matter directly connected with which such person was employed or performed duty. (It is expected that this latter provision, although contained in the Contract Settlement Act, will be codified as permanent law.)

9. To summarize briefly, the prime essential is that the employee avoid any conflict of interest as between his private source of remuneration and the Government, for whom he assumes to perform duties. Absent such a conflict, an employee may receive compensation for services from industry and compensation for services to the Government (if he is a regular employee, he owes 40 hours a week to the Government); the employee may

Chairman of the Munitions Board - 5 -

22 January 1949

be on leave of absence with pay from industry may not give his time free to the Government as an officer or employee (he may, of course, be consulted on matters within his peculiar knowledge without being paid); the employee may be on leave with partial pay from industry and receive full pay from the Government; the employee may not be paid by industry for services rendered to the Government whether or not in addition to money received from the Government; the employee may be a full-time industry employee and render consulting services to the Government on a per diem basis without becoming an employee or officer of the Government within the meaning of certain criminal statutes.

(Signed) L. Niederlehner  
Counsel for the Munitions Board